Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN WILLIAM GOFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether deference was due the trial judge's finding of unusual and extraordinary family hardship warranting departure downward under the sentencing guidelines.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not yet officially reported. United States v. Goff, No. 93-2039, slip op. (8th Cir. April 6, 1994).

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment against Petitioner on April 6, 1994. His petition for rehearing was denied on June 30, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3553(b).

> Upon review of the record, the court of appeals shall determine whether the sentence---
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an

incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for---

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court, unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

18 U.S.C. § 3742(e).

If the court of appeals determines that the sentence---

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for

further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and---

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

18 U.S.C. § 3742(f).

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

U.S.S.G. § 5H1.6

STATEMENT OF THE CASE

Petitioner pled guilty to one count of money laundering in violation of 18 U.S.C. § 1956(a). The trial court departed downward and sentenced petitioner to six months' incarceration. "At the time of his sentencing, Goff was supporting three young sons, and his wife had begun receiving Social Security disability benefits for a depression disorder and panic attacks. With Goff retired, the family's primary source of income is rental property that Goff manages." United States v. Goff, No. 93-2039, slip op. 5 (8th Cir. April 6, 1994); Appendix A at ix. "His wife, who is thirty years his junior, was found by the district court to be entirely disabled and unable to care for their children. She has been declared totally disabled by the Social Security Administration due to her serious emotional and psychological problems. In addition to his disabled wife,

Goff is responsible for three young children. At the time of sentencing, his children were eleven years old, four years old, and six months old. Health care personnel familiar with the situation stated in no uncertain terms that his wife is unable to care for the children." United States v. Goff, supra at 7 (dissenting opinion of Heaney, Sr. C.J.); Appendix A at xiii-xiv. "The district court found that Goff's presence was absolutely necessary to his family's well-being, and departed on that basis." United States v. Goff, supra at 7; Appendix A at xiii.

A three-judge panel of the United States Court of Appeals reviewed "de novo whether the factors relied upon by the district court are permissible grounds for departure." United States v. Goff, supra at 2; Appendix A at iii. The majority concluded that "the factors relied upon by the district court" did "not take this case outside the Guidelines'

heartland so that a downward departure is warranted," and remanded for resentencing "within the appropriate Guidelines range." United States v. Goff, supra at 6; Appendix A xi-xii.

Petitioner timely filed a Petition for Rehearing With Suggestions for Rehearing En Banc. The court requested the Government to respond thereto. Appendix B. The petition for rehearing and the suggestion for rehearing en banc were denied. Appendix C. "Judge McMillian would grant the suggestion for rehearing en banc." Ibid.

REASONS WHY THE WRIT SHOULD ISSUE

THE COURT OF APPEALS ERRED IN FAILING TO GIVE DEFERENCE TO THE TRIAL JUDGE'S FINDING OF UNUSUAL AND EXTRAORDINARY FAMILY HARDSHIP WARRANTING DEPARTURE DOWNWARD UNDER THE SENTENCING GUIDELINES

It is undisputed that petitioner's wife is totally disabled, that he is solely responsible for her care and that of three young children, and that his "presence" is "absolutely necessary to his family's well-being." United States v. Goff, No. 93-2039, slip op. 5, 7 (8th Cir. April 6, 1994); Appendix A ix, xiii-xiv. It is also undisputed that "'[e]xtraordinary family circumstances' may justify a downward departure." United States v. Goff, supra at 5; Appendix A ix. The issue which divided the majority of the Eighth Circuit panel on one side, and the dissent and the trial judge on the other side, was whether petitioner's "family situation is so extraordinary as to warrant a downward departure." Ibid.

The Eighth Circuit reviewed "de novo whether the factors relied upon by the district court are permissible grounds for departure. . . . In other words, whether a particular case falls outside the Guidelines' heartland is an issue of law." United States v. Goff, supra at 2; Appendix A at iii.

This standard of review is contrary to that applied by at least six circuits, namely, the First Circuit (United States v. Rivera, 994 F.2d 942 (1st Cir. 1993)), the Third Circuit (United States v. Higgins, 967 F.2d 841 (3d Cir. 1992)), the Fourth Circuit (United States v. Deigert, 916 F.2d 916 (4th Cir. 1990)), the Seventh Circuit (United States v. Carey, 895 F.2d 318 (7th Cir. 1990)), the Ninth Circuit (United States v. Martinez-Guerrero, 987 F.2d 618 (9th Cir. 1993)), and the Tenth Circuit (United States v. Slater,

971 F.2d 626 (10th Cir. 1992)).[1] These circuits defer to the trial judge's determination that defendant's circumstances are "unusual" or "extraordinary," and set aside such findings only if they are "clearly erroneous." On the other hand, the Sixth Circuit has squarely lined up in the Eighth Circuit's "de novo review" camp (United States v. Hays, 899 F.2d 515 (6th Cir. 1990)).[2]

The Eighth Circuit's plenary standard of review as to whether mitigating circumstances are extraordinary or unusual appears to be contrary to the spirit, if not the letter, of the governing statute: "Upon review of the record, the court of appeals shall determine whether the

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[1] Although it is not totally clear, the Second Circuit also appears to give deference to the trial judge's finding of "unusual" or "extraordinary" circumstances. See United States v. Alba, 933 F.2d 1117, 1122 (2d Cir. 1991)("abuse of . . . discretion").

[2] See the excellent dissenting opinion of Chief Judge Merritt in United States v. Brewer, 899 F.2d 503, 511-15 (6th Cir. 1990).

sentence . . . is outside the applicable guideline range, and is unreasonable, having regard for . . . the reasons for the imposition of the particular sentence, as stated by the district court . . . . The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e)(Emphasis added.).

The de novo standard of review applied by the Eighth Circuit also appears to be in conflict with this Court's "view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" Williams v. United States, 112 S.

Ct. 1112, 1121 (1992); see United States v. Rivera, supra at 952.

All sides agree that "[p]lenary review is appropriate where the question on review is simply whether or not the allegedly special circumstances (i.e., the reasons for departure) are of the 'kind' that the Guidelines, in principle, permit the sentencing court to consider at all." United States v. Rivera, supra at 951 (Emphasis in original.); accord, United States v. Deigert, supra at 919; United States v. Pena, 930 F.2d 1486, 1494 (10th Cir. 1991); see Burns v. United States, 501 U.S. 129, 151 n.6 (1991) (Souter, J., dissenting). If the "special circumstances" in a particular defendant's case pass this threshold test, and are determined to be of the "kind" that may authorize departure, then the question is whether the specific facts in defendant's case are "extraordinary" or "unusual." It is on the standard of review of the district court's findings as to this issue

that the minority view followed by the court below departs from that of the majority.

The majority view considers the question of whether circumstances are "extraordinary" or "unusual" to be a question of fact. "Whether or not factors are extraordinary is a question of fact to which the clearly erroneous standard applies on appeal." United States v. Deigert, supra at 919; accord, United States v. Slater, supra at 635; United States v. Martinez-Guerrero, supra at 621; United States v. Roe, 976 F.2d 1216, 1218 n.1 (9th Cir. 1992). The Sixth and Eighth Circuits deem this to be "an issue of law." United States v. Goff, supra at 2; Appendix A iii; United States v. Hays, supra at 519.

From a common-sense point of view, the merits of the majority position seem obvious. What is not "usual" is "unusual"; the "extraordinary" is not "ordinary." The "unusual" can only be judged by comparison with the

"usual," and the "extraordinary" appears only when contrasted with the "ordinary." The more "family circumstances" a judge sees, the better situated he will be to distinguish the "unusual" from the "usual" and the "extraordinary" from the "ordinary." This is as much a factual determination as plotting points on a bell curve.

The rationale underlying the majority view is elaborated best in United States v. Rivera, supra at 951:

> In many . . . instances, . . . the district court's decision that circumstances are of a "kind," or "degree," that warrant departure will *not* involve a "quintessentially legal" interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent. A district court may well have a special competence in making this kind of determination, because it may have a better "feel" for the unique circumstances of the particular case before it. A district court is also likely to have seen more *ordinary* Guidelines cases, for appellate courts hear only the comparatively few cases that counsel believe present a colorable appeal. . . . To ignore the district court's special competence---about the

> "ordinariness" or "unusualness" of a particular case---would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case, which reactions, reduced to written reasons for departure, can help the Commission determine whether, and how, Guidelines revision should take place. . . . Thus, appellate courts should review the district court's determination of "unusualness" with "full awareness of, and respect for, the trier's superior 'feel' for the case," . . . not with the understanding that review is "plenary."

The First Circuit logic finds its echo in the Ninth Circuit:

> Because of their experience with the sentencing process, district courts enjoy an expertise foreign to both the Sentencing Commission and the appellate courts. This expertise complements the district court's greater familiarity with the particular factual twists of a case. Therefore, we hold that abuse of discretion is the proper standard of review for determining that a circumstance is a proper basis for departure.

United States v. Lira-Barraza, 897 F.2d 981, 985 (9th Cir. 1990).

The instant case illustrates the morass into which the lure of de novo review may lead appellate courts. Senior United States District

Judge Cahill and Senior Circuit Judge Heaney found petitioner's family circumstances unusual and extraordinary; Circuit Judges Fagg and Loken reached the opposite determination. Because the de novo standard of review subtracted Judge Cahill's views from the equation, petitioner, who has already served the six-month sentence imposed by Judge Cahill, is facing a return to prison for another four years---six years after the events which led to his guilty plea occurred.

The goal of the Guidelines is to eliminate sentencing disparities. Yet, as Judge Heaney pointed out in his dissenting opinion:

> Were Goff's appeal being heard in the Second or Tenth Circuits, the government would practically be forced to concede the propriety of departure under these circumstances. See United States v. Johnson, 964 F.2d 124, 127-30 (2d Cir. 1992); United States v. Pena, 930 F.2d 1486, 1494-95 (10th Cir. 1991).[3] In the First and Third Circuits, the precedents lean toward allowing this departure. See United States v. Sclamo, 997 F.2d 970, 973-74 (1st

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[3] Judge Heaney might also have cited United States v. Alba, supra at 1122.

Cir. 1993); United States v. Gaskill, 991 F.2d 82 (3d Cir. 1993).

United States v. Goff, supra at 7-8; Appendix A xiv-xv.

It is anomalous indeed that the divergence of standards of review actually appears to be promoting disparity in sentencing between the circuits, and not uniformity.

The writ should be granted to resolve this clear-cut conflict between the circuits.

The writ also should be granted because the de novo standard of review is a totally unwarranted waste of appellate judicial resources. The majority view reverses downward departures only where the trial court's finding that circumstances are "extraordinary" or "unusual" is "clearly erroneous." United states v. Fahm, 13 F.3d 447, 450 (1st Cir. 1994); United States v. Rivera, supra at 950; United States v. Deigert, supra at 919; United States v. Carey, supra at 324; United States v. Roe, supra at

1217; United States v. Martinez-Guerrero, supra at 620; see United States v. Alba, supra at 1122 ("abuse of discretion"); United States v. Lira-Barraza, supra at 985 ("abuse of discretion"). De novo review may be a boon to the legal publishing industry, but it serves no legitimate function in evaluating the factual bases for sentencing departures.

Finally, the writ should be granted because the de novo review practitioners have lost sight of their ultimate goal---"reasonableness." Congress has empowered a court of appeals to set aside a sentence "outside the applicable guideline range" only upon a determination that the sentence is "unreasonable"! 18 U.S.C. § 3742(f)(2). The deferential standard of review is "consistent with Congress' instruction that appeals courts 'shall affirm' reasonable departures." United States v. Rivera, supra at 952. The court of appeals' "role is to review sentences which depart from the Guidelines to prevent unreasonable sentences, not to improve

reasonable ones." United States v. Lira-Barraza, supra at 985 n.11. The Eighth Circuit panel did not find the trial judge's departure downward for extraordinary family circumstances "unreasonable," as required by the statute; in fact, the opinion does not even mention that term, or any form thereof.

The goals of the guideline legislation can be achieved only if "reasonableness" is the byword. "Reasonableness" can only be found through granting due deference to the trial courts' findings. Petitioner prays that this writ be granted to achieve uniformity in according "due deference" to relevant trial court determinations.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-2039

United States of America,*
*
Plaintiff - Appellant, *
* Appeal from the
vs. * United States
* District Court
John William Goff, * for the Eastern
* District of
Defendant-Appellee. * Missouri.

Submitted: September 14, 1993

Filed: April 6, 1994

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

LOKEN, Circuit Judge.

John William Goff pleaded guilty to one count of money laundering in violation of 18 U.S.C. § 1956(a). At sentencing, the district

court determined that Goff's Guidelines sentence range is 51 to 63 months in prison under U.S.S.G. § 2S1.1. Finding that range "unduly harsh," the court departed downward and sentenced Goff to six months' incarceration with work release, citing as departure factors the absence of prior convictions, the "relatively minor" nature of the offense, Goff's advanced age, and the need to care for his family. The government appeals, arguing that the reasons relied upon by the district court do not justify a downward departure. We reverse.

A district court may depart from the Guidelines when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(B). Parts 5H1 and 5K2 of the Guidelines define the relevance of many factors to the

departure decision.

Departures are reserved for unusual cases, those outside the "heartland" carved by the remainder of the Guidelines. See Ch. 1, Pt. A, comment. 4(b). They are "intended to be quite rare." United States v. Justice, 877 F.2d 664, 666 (8th Cir.), cert. denied, 493 U.S. 958 (1989). We review de novo whether the factors relied upon by the district court are permissible grounds for departure. See United States v. Maul-Valverde, 10 F.3d 544, 546 (8th Cir. 1993). In other words, whether a particular case falls outside the Guidelines' heartland is an issue of law.[1]

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[1] In United States v. Rivera, 994 F.2d 942, 952 (1st Cir. 1993), the First Circuit modified this standard to give greater deference "to sentencing court determinations of whether (and the extent to which) given circumstances make a case 'unusual' or 'not ordinary.'" This circuit has not adopted that modification. See, e.g., United States v. Groene, 998 F.2d 604 (8th Cir. 1993). The author of this opinion agrees with the Rivera modification but does not believe that its adoption would change the result in this case.

Thus, we must examine each factor relied upon by the district court in granting Goff a downward departure.

A. Criminal History. In addition to placing Goff in Criminal History Category I, the district court gave as a reason for departure the fact that Goff had "no prior convictions that this Court must count." The Guidelines expressly provide:

> The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.

§ 4A1.3, p.s. (emphasis added). Thus, departure for this reason "is an incorrect application of the guidelines." United States v. Simpson, 7 F.3d 813, 819 (8th Cir. 1993).

B. Minor Offense. Goff pleaded guilty to Count I of a two-count money laundering indictment. This count alleged that Goff had

violated 18 U.S.C. § 1956(a)(1)(B)(ii) by advising his client, drug dealer Michael Salsman, to structure a $15,000 cash deposit so as to avoid the filing of a currency transaction report with the Internal Revenue Service. At the change-of-plea hearing, Goff admitted suspecting that Salsman's funds were the proceeds of illegal activity, but denied knowing that Salsman had engaged in drug crimes. In exchange for his plea, the government dropped count two of the indictment, which charged Goff with helping Salsman launder a far larger sum of money.

The PSR assigned Goff a base offense level of 20 under § 2S1.1(a)(2). Disregarding the change-of-plea proceedings, the PSR also assessed two enhancements -- it increased Goff's BOL by three levels because he knew Salsman's funds were illegal drug proceeds, see U.S.S.G. § 2S1.1(b)(1), and by one additional level because he laundered more

than $100,000, see § 2S1.1(b)(2)(B), including the sum charged in the dismissed Count II. Goff filed written objections to these PSR findings, but no evidentiary hearing was held.

At sentencing, the district court accepted the PSR's findings but departed because of Goff's "relatively minor" offense:

> [M]oney laundering takes all kinds of forms from Swiss bank accounts and all kinds of other major things like that, to something that's relatively minor. And I think this is relatively minor."

On appeal, Goff argues that this departure was appropriate, citing United States v. Skinner, 946 F.2d 176 (2d Cir. 1991). In Skinner, the court held that a downward departure from § 2S1.1 would be appropriate for conduct that violated the literal language of 18 U.S.C. § 1956 but was not intended to conceal criminal activity or to promote further crimes. See also United States v. White Buffalo, 10 F.3d 575, 576 (8th Cir. 1993) (downward departure may be warranted under § 5K2.11 for conduct

that is only "technically unlawful"). Goff suggests that an appropriate base offense level in this case would be 13, the level prescribed for currency transaction structuring offenses at the time of Goff's sentencing. See U.S.S.G. § 2S1.3; App. C ¶ 490.

Goff's reliance on Skinner is misplaced, for his offense conduct is squarely within the prohibitions of § 1956. At the change-of-plea hearing, Goff admitted that he knew or suspected that Salsman had bought property with the proceeds of illegal activity, and that he told Salsman filing a currency transaction report "could get them all in trouble." In these circumstances, Goff's conduct was not merely technically unlawful. Therefore, his base offense level must be determined in accordance with § 2S1.1, and a downward departure may not be based upon the "relatively minor" nature of his offense.

Although the nature of Goff's criminal activity has been adequately taken into consideration in § 2S1.1, and therefore may not justify a departure, we are concerned that the district court's blanket acceptance of the PSR, including the 4-level enhancements under § 2S1.1(b), to which Goff specifically objected, may have been based upon the court's intention to depart downward, rather than a careful consideration of whether the government met its burden of proof with respect to those enhancements. Therefore, on remand, the district court is encouraged to reconsider those enhancements on a proper factual record. See United States v. Montanye, 996 F.2d 190, 192-93 (8th Cir. 1993) (en banc).

C. Family Responsibilities. "Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline

range." § 5H1.6, p.s. Thus, only "[e]xtraordinary family circumstances" may justify a downward departure. United States v. Vidrickson, 998 F.2d 601, 603 (8th Cir. 1993). At the time of his sentencing, Goff was supporting three young sons, and his wife had begun receiving Social Security disability benefits for a depression disorder and panic attacks. With Goff retired, the family's primary source of income is rental property that Goff manages.

We cannot agree with the district court that this family situation is so extraordinary as to warrant a downward departure. "All families suffer when one of their members goes to prison." United States v. Shortt, 919 F.2d 1325, 1328 (8th Cir. 1990) (reversing downward departure for defendant who was sole source of family income, helped his disabled father to farm, and whose wife had a history of substance abuse). Even a defendant's status

as a single parent does not warrant a downward departure. See United States v. Harrison, 970 F.2d 444, 447-48 (8th Cir. 1992); United States v. Johnson, 908 F.2d 396, 399 (8th Cir. 1990). The Goff family has multiple sources of income and a substantial net worth, and in any event, "personal financial difficulties . . . do not warrant a decrease in sentence." § 5K2.12, p.s. Though we do not underestimate the hardship that Goff's incarceration will cause his family, his family responsibilities are simply not outside the heartland of cases that the Sentencing Commission has considered. Compare United States v. Neil, 903 F.2d 564, 566 (8th Cir. 1990).

D. Age. Like a defendant's family responsibilities, his age is not "ordinarily relevant" in determining whether to depart.

§ 5H1.1, p.s.[2] At sentencing, Goff was 67 years old and in good health. We have consistently denied departures to healthy defendants in this age group. See United States v. Tucker, 986 F.2d 278, 280 (8th Cir.)(reversing downward departure and imposing six-year statutory maximum sentence on 67 year-old defendant), cert. denied, 114 S. Ct. 76 (1993); Harrison, 970 F.2d at 447 (no departure warranted for healthy, 64 year-old defendant). Goff's age cannot justify the district court's downward departure.

Having carefully considered the record and the factors relied upon by the district court, we conclude that those factors, whether viewed singly or in combination, do not take this case outside the Guidelines' heartland so

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[2] This policy statement goes on to state that age "may be a reason to [depart downward] when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration."

that a downward departure is warranted. Accordingly, the sentence is reversed, and the case is remanded to the district court with instructions to resentence Goff within the appropriate Guidelines range.

HEANEY, Senior Circuit Judge, concurring and dissenting.

I join all of the court's opinion but section C on family responsibilities. I particularly agree with the view expressed in footnote one that deference should be given to the district court's finding that the circumstances of a particular case make it unusual or out of the ordinary. Whether or not one applies that notion to the family circumstances in this case, I believe the facts warrant the district court's decision to depart on the basis of Goff's family responsibilities. Although we must remand for resentencing because of the court's consideration of factors that I agree are not

available under our precedents, I believe the district court should be allowed to consider departing solely on the basis of family circumstances. It is on that basis that I am compelled to dissent.

This is not simply an ordinary case of a family suffering whatever tangible or intangible harm ordinarily accompanies incarceration of one of its members. The district court found that Goff's presence was absolutely necessary to his family's well-being, and departed on that basis. The issue is not whether Goff's family will suffer financially, but whether his family responsibilities are extraordinary. His wife, who is thirty years his junior, was found by the district court to be entirely disabled and unable to care for their children. She has been declared totally disabled by the Social Security Administration due to her serious emotional and psychological problems. In

addition to his disabled wife, Goff is responsible for three young children. At the time of sentencing, his children were eleven years old, four years old, and six months old. Health care personnel familiar with the situation stated in no uncertain terms that his wife is unable to care for the children.

This leaves the question whether these circumstances are any different than those of a single-parent family, which, unbelievably to me, we have held to be absolutely ordinary, apparently without exception. The district court believed that these circumstances are sufficiently different to warrant departure, and I cannot conclude as a matter of law that this finding was error. In fact, I believe that these circumstances fully support departure, and we should simply remand to the district court to determine the degree.

Were Goff's appeal being heard in the Second or Tenth Circuits, the government would

practically be forced to concede the propriety of departure under these circumstances. See United States v. Johnson, 964 F.2d 124, 127-30 (2d Cir. 1992); United States v. Pena, 930 F.2d 1486, 1494-95 (10th Cir. 1991). In the First and Third Circuits, the precedents lean toward allowing this departure. See United States v. Sclamo, 997 F.2d 970, 973-74 (1st Cir. 1993); United States v. Gaskill, 991 F.2d 82 (3d Cir. 1993). Our precedents are, of course, much stingier in the discretion we choose to allow the district courts in these matters, but even under those precedents, which admittedly do not allow departure for several of the reasons relied on by the district court, departure based on the defendant's unusual family responsibilities is warranted. The strongest Eighth Circuit case against departure is probably United States v. Harrison, 970 F.2d 444 (8th Cir. 1992), but in that case the court specifically noted that

most of the assertions involving the other family members' inability to care for the young children in question were undocumented. See id. at 448 n.4. In this case, the district court had ample evidence on which to base its findings that Goff's wife was herself disabled and that she was therefore unable to care for their children. Goff's family responsibilities are unusual, and rather than simply follow our existing precedents on this question, the court today closes another avenue through which district courts might otherwise rightfully exercise their discretion in sentencing.

Congress did not intend to make calculating machines of our district judges, yet time and time again this court has seen fit to remove discretion from the district courts, where it is subject to review by this court, and transfer that discretion to prosecutors whose actions remain utterly

unreviewable. Today the court pulls another plank from beneath the district judges, mandating that they swim in the sea of the guidelines, instructing them that any attempt to reach higher ground and exercise their informed judgment about the facts of a defendant's life will be frustrated by this court, and again I am compelled to dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. COURT & CUSOM HOUSE
1114 Market Street
St. Louis, Missouri 63101

April 26, 1994

Ms. Janet Jones
U.S. DEPARTMENT OF JUSTICE
Tax Division
P.O. Box 502
Washington, DC 20044

Re: 93-2039EMSL United States v. John William Goff

Dear Counsel:

A petition for rehearing with suggestions for rehearing en banc has been filed by the appellee in the above case. I have been instructed by the court to request you to respond to the petition.

Please submit 21 copies of your response, limited to ten pages, by Friday, 5/6/94. If you have any questions concerning the court's request, please contact this office.

Sincerely,

Michael E. Gans/M

Michael E. Gans
Clerk of the Court

jlm

cc: Charles L. Merz
John William Goff
Alan G. Kimbrell
Robert E. Lindsay
Alan Hechtkopf
William Harris
Robert St. Vrain

District Court/Agency Case Number(s):
4:92-CR-10(CSC)

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-2039EMSL

United States of America, Appellant, vs. John William Goff, Appellee.	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

June 30, 1994

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN WILLIAM GOFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for Writ of Certiorari have been served on respondent by mailing same, postage prepaid, to Ms. Janet Jones, U.S. DEPARTMENT OF JUSTICE, Tax Division, P.O. Box 502, Washington, DC 20044 on this 10th day of August _____, 1994.

Alan Kimbrell

ALAN G. KIMBRELL
1108 Olive Street
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St. Louis, MO 63101
314/241-5282

Attorney for Petitioner

Supreme Court, U.S.
FILED
OCT 13 1994
OFFICE OF THE CLERK

No. 94-371

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN WILLIAM GOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals erred in reviewing de novo the district court's determination that petitioner's family situation constituted an extraordinary circumstance warranting a downward departure from petitioner's sentencing range under the Sentencing Guidelines.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. Ai-Axvii) is reported at 20 F.3d 918.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1994. A petition for rehearing was denied on June 30, 1994. Pet. App. Ci. The petition for a writ of certiorari was filed on August 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C, 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of money laundering, in violation of 18 U.S.C. 1956(a). The district court departed downward from the Sentencing Guidelines range of 51 to 63 months' in prison, and sentenced petitioner to six months imprisonment with work release. The court of appeals reversed and remanded with instructions to resentence petitioner within the Guidelines range. Pet. App. Ai-Axii.

1. In late 1986 or early 1987, petitioner, a former business consultant, became associated with a successful narcotics dealer named Michael Salsman. In January 1992, that association resulted in petitioner's indictment on two counts of money laundering. 18 U.S.C. 1956(a)(1)(B)(i) and (ii). Count 1 of the indictment was based on petitioner's having advised Salsman to structure a $15,000 cash purchase of real estate so as to avoid the filing of a currency transaction report with the Internal Revenue Service. Count 2 related to approximately $73,000 in drug proceeds that had been deposited into the bank account of a corporation set up by petitioner as part of an alleged scheme to filter Salsman's drug proceeds into legitimate businesses. On the morning of trial, petitioner agreed to plead guilty to Count 1 of the indictment in exchange for a dismissal of Count 2 upon imposition of sentence. Pet. App. Aiv-Av; Gov't C.A. Br. 2, 4-5.

At petitioner's sentencing hearing, the district court determined that petitioner's offense was governed by Sentencing Guidelines § 2S1.1 and that his sentencing range was 51 to 63 months in prison. The court, however, believed that range to be "unduly harsh," and it

departed downward to sentence petitioner to six months' imprisonment with work release. Pet. App. Ai-Aii. The court based the departure on petitioner's age (68 at the time of sentencing), his lack of prior convictions, the "relatively minor" nature of his offense, and his family responsibilities to three young sons and a wife receiving Social Security benefits for depression and panic disorder. [1] *Id.* at Aii; Gov't C.A. Br. 13-14.

2. The government appealed petitioner's sentence. It argued that petitioner's prior record, his age, and the purportedly "minor" nature of his offense were not permissible grounds for departure at all, and that petitioner's family circumstances did not support departure from the Guidelines because his family circumstances were not sufficiently atypical. Gov't C.A. Br. 15. With respect to the latter point, the government noted evidence that petitioner had a net worth of more than $800,000 and was frequently absent from the family home in Arizona because he traveled to St. Louis to manage an apartment building owned by his wife. *Id.* at 1-2, 9-14, 28-31.

Reviewing de novo whether the factors cited by the district court were permissible grounds for departure, a divided panel of the court of appeals reversed and remanded the case with directions that petitioner be

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[1] In an effort to show that his family circumstances justified a departure, petitioner submitted four pieces of documentation: an unsigned two-and-one-half-year-old letter from a physician stating that Mrs. Goff was being treated for work stress; an excerpt from an unidentified document stating that Mrs. Goff was under treatment for depression and panic related to her job; Mrs. Goff's notice of award from the Social Security Administration; and a therapist's letter stating in conclusory fashion that petitioner's presence was necessary for his family's stability. Gov't C.A. Br. 9-12.

resentenced within the appropriate Guidelines range. Pet. App. Axii. The court of appeals found that each ground on which the sentencing court had relied was insufficient: (1) petitioner had not been found to be infirm, and the court of appeals had "consistently denied departures" based solely on age to others in petitioner's age group, *id.* at Ax-Axi; (2) the absence of any prior convictions provided no ground for departure, because petitioner's criminal history classification (Category I) was already "set for a first offender with the lowest risk of recidivism," *id.* at Aiv; (3) no downward adjustment was warranted based on the view that petitioner's offense was "minor," because, far from being "merely technically unlawful," petitioner's actions were knowing and fell squarely under the money laundering statute, *id.* at Avii; and (4) recognizing that "[a]ll families suffer when one of their members goes to prison," petitioner's "family responsibilities are simply not outside the heartland of cases that the Sentencing Commission has considered," *id.* at Aix-x.[2]

ARGUMENT

Petitioner argues (Pet. 9-20) that the court of appeals erred in applying a de novo standard of review to the district court's determination that his family situation constituted extraordinary circumstances warranting a downward departure.[3] Noting that other circuits apply a

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[2] The dissenting circuit judge disagreed with the majority with respect to its holding that family circumstances did not justify a departure in this case. Pet. App. Axii.

[3] As a general rule, a district court must impose a sentence within the applicable Guideline's range unless it finds mitigating circumstances that are of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines and determines that those circumstances

"clearly erroneous" or similarly deferential standard of review, he urges this Court to resolve the conflict. We believe the court of appeals was correct in reviewing de novo the district court's departure from the applicable Guidelines range. We recognize, however, that the First,[4] Fourth,[5] Seventh,[6] Ninth,[7] and Tenth[8] Circuits apply a more deferential standard of review.[9] Although the conflict may warrant review in an appropriate case, this case is not an appropriate vehicle for that review, since the application of a more deferential standard would not have altered the outcome for petitioner.

1. All courts of appeals review de novo whether the circumstances cited by the district court are of a kind

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should result in a different sentence. 18 U.S.C. 3553(b); Sentencing Guidelines § 5K2.0, Policy Statement. Where the Commission has fully considered a factor in establishing the Guidelines, that factor is not a valid ground for a departure. *United States* v. *Wesley*, 990 F.2d 360 (8th Cir. 1993).

[4] See *United States* v. *Rivera*, 994 F.2d 942, 950 (1st Cir. 1993).

[5] *United States* v. *Deigert*, 916 F.2d 916, 919 (4th Cir. 1990).

[6] *United States* v. *Carey*, 895 F.2d 318, 323 (7th Cir. 1990).

[7] *United States* v. *Martinez-Guerrero*, 987 F.2d 618, 620 (9th Cir. 1993).

[8] *United States* v. *Slater*, 971 F.2d 626 (10th Cir. 1992).

[9] As petitioner notes, the Sixth Circuit appears also to have adopted a de novo standard of review. See *United States* v. *Hays*, 899 F.2d 515, 519, cert. denied, 498 U.S. 958 (1990). Contrary to petitioner's interpretation, we do not read *United States* v. *Higgins*, 967 F.2d 841, 843 (3d Cir. 1992), to approve a deferential standard of review. In *Higgins*, the sentencing court had refused even to consider a downward departure based on the defendant's circumstances. The Third Circuit remanded the case, stating that the determination whether the circumstances were extraordinary was for the district court to make in the first instance. *Id.* at 846 n.2. The court of appeals did not hold that its review of the district court's determination would be deferential.

that may ever warrant departure from the Guidelines. Similarly, all apply the "clearly erroneous" standard to district court findings respecting the historical facts at issue. The only facet of the analysis on which the courts differ is in their review of a district court determination that the particular factual circumstances are sufficiently extraordinary to warrant departure; *i.e.*, when departure is theoretically permissible for a class of circumstances, whether the facts justify a reduction of the sentence.

According a high degree of deference to departures from the Guidelines is fundamentally inconsistent with the rationale underlying the federal sentencing scheme. Deferential review effectively frees each district court to apply its own sense of what is "usual" or "ordinary" in determining whether, in an individual case, a departure is warranted. The Sentencing Reform Act, however, was enacted "to eliminate the 'unwarranted disparit[ies] and . . . uncertainty' associated with indeterminate sentencing." *Burns* v. *United States*, 501 U.S. 129, 133 (1991) (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 49 (1983)). Giving each district court leeway to depart from Guidelines sentencing ranges in accordance with its own notion of what constitutes extraordinary circumstances would decrease uniformity in sentencing and promote the very uncertainty and inequity the Guidelines were meant to avoid.[10]

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[10] Petitioner argues (Pet. 18) that "the *de novo* standard of review is a totally unwarranted waste of appellate judicial resources." But regardless of the standard employed, where there is an appeal, a court of appeals still must review a sentencing court's determination as to whether circumstances permit a departure. Petitioner further argues (Pet. 19) that "the *de novo* review practitioners have lost sight of their ultimate goal—'reasonableness,'" and that, under 18 U.S.C. 3742(f)(2), a sentence

2. Even under a deferential standard of review, the district court's finding that petitioner's family circumstances were extraordinary could not survive scrutiny. Indeed, the author of the opinion in this case stated his belief that the panel would have reversed the district court even under a deferential standard of review. Pet. App. Aiii n.1. The record amply supports that conclusion.

The record in this case establishes only the truism that a family suffers when one of its members, particularly the head of the household, is incarcerated. The evidence demonstrated, at most, that Mrs. Goff is unable to care for the couple's children. But the Goffs have considerable assets, and there is nothing in the record to show that they could not use those assets to obtain whatever help they might need in caring for their children. The record also contains nothing to indicate that petitioner's unique presence is unusually important to the health or well-being of his children, beyond a conclusory statement that petitioner's presence is needed for the family's stability. In view of the Commission's intention that departures "be quite rare,"

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outside the applicable guideline range may be set aside only if it is unreasonable. Under 18 U.S.C. 3553(b), however, a downward departure is not allowed in the absence of mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission. Where, as here, the circumstances are within the heartland of the Guidelines and do not meet the requirements for a downward departure, any sentence below the sentencing range must be deemed unreasonable within the meaning of Section 3742(f)(2). See *Williams* v. *United States*, 112 S. Ct. 1112, 1120 n.2, 1121 (1992) (equating analysis of whether circumstances were adequately taken into consideration by the Guidelines with analysis of whether departure from the Guidelines range was reasonable).

United States v. *Tucker*, 986 F.2d 278, 280 (8th Cir.), cert. denied, 114 S. Ct. 76 (1993), petitioner's family circumstances would not be deemed sufficiently extraordinary to warrant a downward departure, regardless of the standard of review.

Petitioner asserts (Pet. 17-18) that on the facts of this case, other circuits would have affirmed the district court. He refers to several cases cited by the dissent (Pet. App. Axiv-Axv): *United States* v. *Sclamo*, 997 F.2d 970 (1st Cir. 1993); *United States* v. *Gaskill*, 991 F.2d 82 (3d Cir. 1993); *United States* v. *Johnson*, 964 F.2d 124 (2d Cir. 1992); and *United States* v. *Pena*, 930 F.2d 1486 (10th Cir. 1991). He contends that the dissent could have cited *United States* v. *Alba*, 933 F.2d 1117 (2d Cir. 1991), as well. Pet. 17 n.3.

In each of the cases on which petitioner relies, the reviewing court noted detailed, specific facts showing that the defendant's presence was necessary to the well-being of his or her family. *Sclamo*, 997 F.2d at 972-974 (defendant's foster son found to suffer from attention deficit hyperactivity disorder; detailed submission from psychiatrist who had extensive experience with defendant showed defendant's presence as role model was critical to his foster son's development and treatment); *Gaskill*, 991 F.2d at 83-84 (defendant's wife, who suffered from serious mental disorder and was suicidal, required constant care; record showed that there was no means of providing care other than by defendant); *Johnson*, 964 F.2d at 129 (defendant provided sole means of support for four children); *United States* v. *Alba*, 933 F.2d at 1122 (defendant was sole economic support for large family); *Pena*, 930 F.2d at 1494-1495 (defendant's criminal conduct was aberrational and defendant provided sole means of support for her two infant children).

The circumstances in this case are different. The record here shows that the Goffs have ample financial resources to secure any necessary care or other services, and petitioner made no specific showing to demonstrate the necessity of his presence. Given the critical differences between this case and those on which petitioner relies, there is no basis for concluding that another circuit would have reached a different decision from that here.

To the extent that the opinions cited by petitioner shed any light on how those courts would have decided this case, any difference in results would likely derive not from differences in the level of scrutiny, but instead from the panels' differing views of what constitutes an extraordinary family hardship. But differences among the circuits in their application of particular provisions of the Guidelines do not require this Court's intervention; they are, rather, best addressed by the Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

OCTOBER 1994